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SOME PROBLEMS OF REVOCATION AND TERMINATION OF OFFERS

Necessity of Communication — Time of Revocation — Death*

W. J. Wagner**

A. INTRODUCTION

One of the marked differences between the civil law and the common law system in the field of contracts is the facility of revoking offers granted by the latter to offerors. In the civil law systems, as a rule, offers are firm as a matter of law, or, if not, they may be made irrevocable easily, by a mere declaration of the offeror. In the common law, the requirement of consideration renders such an approach impossible.

Among the problems which arise in connection with the revocation of offers, those dealing with the requirement and method of communicating the withdrawal of the proposal and with the time at which this withdrawal becomes effective are outstanding. A different question, but one closely connected with that of revocation of offers, is that of their termination; they may become ineffective because of such reasons as lapse of time, rejection, intervening illegality or death of either party to the negotiations. The last of these will be treated in the present observations; the others demand a separate treatment.¹

B. NECESSITY OF COMMUNICATION

1. *In General*

If we were strictly to apply the idea that contracts are made by the "meeting of the minds" between the contracting parties at a particular moment, it would follow that no communication of the revocation of an offer by the offeror to the offeree is necessary. If, at the time of the purported acceptance, the offeror has changed his mind, no meeting of the minds is possible, and the formation of the contract cannot take place. This, indeed, was the theory of an English case of 1790, *Cooke v. Oxley*,² in which D offered to sell some tobacco at a certain price should P accept the proposal before 4 o'clock the same day. P gave D a notice of acceptance before the deadline, but D, having changed his mind, refused to enter into the transaction. It was held that no contract was made. Only a few American cases seem to have been influenced by *Cooke v. Oxley*.

With the modern recognition of the idea that the essence of the

* This article is based on papers prepared by the author for the Fall 1961 session of the Cornell Law School Project on the General Principles of Law Recognized by Civilized Nations and published here with the permission of that Project. Concerning the nature of the comparative research undertaken by the Cornell Project, see Schlesinger, "The Common Core of Legal Systems — An Emerging Subject of Comparative Study," in *XXth Century Comparative and Conflicts Law — Legal Essays in Honor of Hessel E. Yntema* at 65 (1961).

The present article states what the United States law is, in the light of judicial decisions, the *Restatement of Contracts* and writings of legal scholars.

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1 For other instances of lapse of an offer, see *RESTATEMENT, CONTRACTS* §§ 35(b), 35(c), 49 (1932).

2 3 T.R. 653, 100 Eng. Rep. 785 (K.B. 1790).

formation of a contract lies in giving to the offeree a power of acceptance, rather than in a meeting of the minds, a different principle has been definitely established. Admittedly, even today freedom of contracting and of making offers permits the offeror to reserve for himself the possibility of revoking his offer without any notice, although it may be asked whether a purported offer reserving for the offeror the power to withdraw it even after acceptance should not be considered an invitation to deal rather than an offer.³ But in the absence of such a reservation, the offeror is bound by the offeree's acceptance if he kept his revocation secret or even if he announced it, or committed an act having the effect of revocation, where the offeree is not put on notice. Thus, in *Tartoria v. Manko*,⁴ a real estate broker, having a general listing of D's property, was held to be entitled to his commission when he procured a customer after the property had been sold since the seller had concealed the sale from the broker.

The doctrine of *Cooke v. Oxley* is reflected in civil code provisions of a few states, with the qualification, however, that the change of mind of the offeror is effective only when he manifests it "by an overt act."⁵ Thus, California,⁶ South Dakota,⁷ North Dakota,⁸ and Montana⁹ require notice of revocation of an offer, but consider revocation complete when notice is put in the course of transmission. These provisions answer the question of what the time of revocation is, which will be more fully considered in part C. The Louisiana Civil Code¹⁰ is silent on notice of revocation, but is understood as requiring it.

Today revocation is generally so strictly connected with the offeree's notice about it, that it has even been defined as the "communication of a change in the offeror's purpose."¹¹ Another authority states that "at the present day it is more accurate to say that communication is essential to the existence of revocation, indeed is the revocation."¹² Clearly, the communication to the offeree of a purported revocation after the offer has been accepted is ineffective; a contract having been entered into, the offeror will have to perform it or respond in damages.¹³ But even a clear revocation, communicated directly to the offeree, may be ineffective if he insists on keeping the offer open and goes ahead with the performance and the offeror knowing this remains silent and makes no further objections.¹⁴ It can be said that in this case the offeror impliedly revokes his revocation. Corbin's comment is that "the offeror, as well as the offeree, is judged by the standard of the reasonable man."¹⁵ It seems that there has been no other case on this point.

3 1 CORBIN, CONTRACTS § 39 (1950).

4 134 Conn. 345, 57 A.2d 493 (1948).

5 1 WILLISTON, CONTRACTS § 56 (3d ed. 1957).

6 CAL. CIV. CODE § 1587.

7 S.D. CODE §§ 10.0318, 10.0321, 10.0322 (1939).

8 N.D. CENT. CODE ANN. § 9-03-19 (1959).

9 MONT. REV. CODES ANN. § 13-319 (1947).

10 LA. CIV. CODE ANN. Art. 1800 (West 1952).

11 Oliphant, *The Duration and Termination of an Offer*, 18 MICH. L. REV. 201, 202 (1920).

12 1 WILLISTON, CONTRACTS § 57 (3d ed. 1957).

13 Ever-Tite Roofing Corp. v. Green, 83 So. 2d 449 (La. Ct. App. 1955).

14 Quick v. Wheeler, 78 N.Y. 300 (1879).

15 1 CORBIN, CONTRACTS § 40 (1950).

2. *Direct Notice of Revocation*

As revocation is ineffective so long as the offeree does not know about it, the best method of revoking is to directly notify the offeree that the offeror has changed his mind in the course of the dealings between the two parties. Although there are formal requirements as to the making of certain types of contracts, there are no similar requirements as to the validity of a revocation. Any means of communicating with the offeree is acceptable. (There may be, however, some problems of evidence in proving the fact of communication.) The rule is expressed in section 41 of the *Restatement of Contracts* entitled "Revocation by Communication from Offeror Received by Offeree":

Revocation of an offer may be made by a communication from the offeror received by the offeree which states or implies that the offeror no longer intends to enter into the proposed contract, if the communication is received by the offeree before he has exercised his power of creating a contract by acceptance of the offer.

The mere intention to revoke is insufficient. If it became impossible to send a notice of revocation to the offeree, *e.g.*, because he left without leaving an address, and he did not learn about the revocation by an indirect notice, the offer will continue to be effective, although it has been suggested that possibly a reasonable effort to revoke should be sufficient to constitute an effective withdrawal.¹⁶ However, if from the communications between the offeree and the offeror it appears that the latter is unwilling to go ahead with the contract, the offer will be considered as withdrawn even if the offeror does not withdraw in so many words. Thus when the offeree was advised by the offeror's broker that the land which had been offered for sale was taken off the market, revocation of the offer took place.¹⁷ Similarly, where the offeror does not formally revoke his proposal, but makes it clear to the offeree that he took a course of action inconsistent with the continuance of the offer, the proposal is withdrawn. Thus an offer to sell the premises to a tenant is revoked by serving upon him a notice to quit because the premises have been sold to someone else.¹⁸ And sometimes even words are unnecessary since with respect to the offer itself, "withdrawal may be evidenced by conduct, as well as by words."¹⁹

Notice of revocation will be effective if communicated to the offeree at any time before the offer is unqualifiedly accepted.²⁰ Where the offeree purported to accept the offer by agreeing to pay to the offeror a consideration asked by the latter, but did not comply with his request to deposit some earnest money, the purported acceptance should be understood as a counterproposal, and the offeror could withdraw his original offer.²¹ In such a situation, it may simply be said that the counterproposal worked as a rejection of the offer which lapsed thereupon, so that no subsequent acceptance could be effective despite lack of a revocation.

16 1 WILLISTON, *CONTRACTS* § 56 (3d ed. 1957).

17 *Antwine v. Reed*, 145 Tex. 521, 199 S.W.2d 482 (1947).

18 *Giovanola v. Fort Lee Bldg. & Loan Ass'n*, 123 N.J. Eq. 103, 196 Atl. 357 (Ch. 1938).

19 *Masonic Temple v. Ebert*, 199 S.C. 5, 18 S.E.2d 584, 589 (1942).

20 An interesting case which turned on the time at which acceptance became effective, whether before or after notice of revocation, was *Davidson v. United States*, 58 F. Supp. 481 (E.D. Wis. 1944).

21 *Antwine v. Reed*, 145 Tex. 521, 199 S.W.2d 482 (1947).

An interesting fact situation was presented in the case of *Hoover Motor Express Co. v. Clements Paper Co.*²² Plaintiff had received a written offer from defendant concerning the purchase of real estate. No consideration was given for the offer. During a telephone conversation with plaintiff's agent one of defendant's partners expressed doubts whether they would go through with the proposal, and stated that they had other plans in mind and would let the plaintiff-offeree know. The outcome of the case depended on the construction given to the telephone conversation. The Supreme Court of Tennessee, reversing the decisions of the courts below, held that statements uttered by the offeror amounted to a withdrawal of the offer. If the offeror's statements on the telephone were understood as a mere intimation that the institution he represented was not enthusiastic about concluding the contract, the case would fall under illustration 2 to section 42 of the *Restatement, infra*, and the offer would not be considered as withdrawn. But the court understood them more definitely. The agent of the offeree who took part in the conversation stated himself that the offeror definitely refused to positively commit himself that he would go through with the proposal, and that the offeree "was very much shocked when [he] heard . . . that they didn't plan to go through with it." Thus the very testimony of the offeree indicated that he understood the offeror's statements as tantamount to the revocation of the offer.

3. Indirect Notice

Aside from direct notice, it has been held that the offeree loses his power of acceptance if he learns by any way that the offer has been revoked, if he has reason to know that it does not stand any more, or even if he has doubts and a reasonable person in his place would investigate whether the offer is still effective. The standard of a reasonable man is imposed on the offeree, and if it appears from the circumstances of the case that it is unreasonable to believe that the offer remains valid, the offeree cannot accept it any longer.²³ Thus in *Watters v. Lincoln*²⁴ the court said: "Plaintiff was informed . . . that the land had been sold. He was so informed by the tenant who farmed the land. Information from such a source is more than common rumor. It was at least sufficient to put plaintiff upon inquiry." It follows that mere rumors are insufficient to put the offeree on notice. But the borderline between rumor and credible information is not easy to establish. "Must the offeree give credit at his peril to haphazard information, or what degree of certainty or probability must exist in order to make the words of an outsider effectual to revoke the offer?" asks Williston,²⁵ and he suggests that the information "must be such that a reasonable man would give it credence." It seems that in cases of doubt the courts are willing to hold that the offer has been revoked. It illustrates their reluctance to find, where circumstances are questionable, that valid contracts have been entered into.

The line of cases settling this point involved an indirect revocation of an

22 193 Tenn. 6, 241 S.W.2d 851 (1951).

23 1 CORBIN, CONTRACTS § 40 (1950).

24 29 S.D. 98, 135 N.W. 712, 715 (1912).

25 1 WILLISTON, CONTRACTS § 57 (3d ed. 1957).

offer to sell by making a sale to another person. That explains the limitation with which the rule has been expressed in the *Restatement*, section 42:

Where an offer is for the sale of an interest in land or in other things, if the offeror, after making the offer, sells or contracts to sell the interest to another person, and the offeree acquires reliable information of that fact, before he has exercised his power of creating a contract by acceptance of the offer, the offer is revoked.

It does not appear, however, that the courts would take another approach in other situations not involving sales, so the rule should probably be considered as having a more general application.²⁶

Knowledge that the offer has been withdrawn is not the same thing as the surmise, or even the knowledge, that the offeror does not desire any longer to enter into the contract. Therefore, if an offeror agrees to sell some stock to the offeree at a certain price if the latter accepts his proposal within a week, the offer is not revoked by the mere fact that the stock price increased considerably before the lapse of that period of time so that the offeror may be unwilling to sell it at the stated price.²⁷

In *Dickinson v. Dodds*,²⁸ a leading case on indirect revocations of offers, the defendant offeror committed himself in writing to hold his offer open until June 12, 9 A.M., and the plaintiff offeree purported to accept it before the expiration of that time. But the offer, being only a "*mere nudum pactum*" without consideration could be withdrawn at any time before acceptance. Lord Justice James stated that there was "neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer." He recognized that "the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed,"²⁹ and proceeded to examine the problem of whether the offeree, on the facts of the case, was on notice of the offeror's change of mind. Though one may agree with the court that the idea of an indirect revocation is sound, it is difficult to approve of the manner in which the court handled this case. From the statement of facts it appears that before the purported acceptance of the offer, the offeree "was informed . . . that Dodds had been offering or agreeing to sell the property"³⁰ to another person. This is a rather vague and ambiguous statement. Did Dickinson learn that Dodds had been offering the property, or that he had agreed to sell it? The outcome of the case clearly should depend on the answer to this question. Perhaps on trial it appeared that the offeree learned that the property had been sold; if so, he should have lost the case. But this does not appear from the record. If it were known to the appellate court which decided the case in the last instance, it should have been clearly stated; and from the fact that the decision below was for Dickinson it seems that probably he did not know that the property had been sold when he purported to accept the offer.

26 1 CORBIN, CONTRACTS § 40 (1950).

27 RESTATEMENT, CONTRACTS § 42, Illustration 2 (1932).

28 2 Ch. D. 463 (1876).

29 *Id.* at 472.

30 *Id.* at 464.

If Dickinson was on notice merely that Dodds had been offering the property for sale to someone else, his power to accept the offer should not have been impaired in any way. In many situations offers are made to more than one person, and the appearance of a second offeree does not have the effect of a withdrawal of the offer to the first one. Therefore, the finding of James, L.J., that "beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer'"³¹ appears quite unwarranted. James proceeded to make other questionable statements, *e.g.*, that Dickinson purported to accept the offer "knowing all the while that he [Dodds] had entirely changed his mind." No wonder, in spite of the fact that the law of the case has generally been accepted, that the opinions of the judges have been subjected to criticism and their ambiguity pointed out.³²

4. Statutory Provisions

The David Dudley Field Civil Code, adopted in California, Montana, North Dakota and South Dakota, has a provision reading as follows:

Consent can be communicated with effect only by some act or omission of the party contracting by which he intends to communicate it, or which necessarily tends to such communication.³³

A succeeding section of the Code makes the above provision applicable to revocations of proposals. It seems rather clear that the effect of the above provision is to prevent indirect notice from being effective, although the case of *Dickinson v. Dodds*,³⁴ which originated the idea of such notice, was decided eleven years after the Code had been drafted. The draftsmen themselves commented upon this provision as follows: "This is intended to exclude the possible case of the declaration of consent made to a person having no interest in the contract, and communicated by him to the other without authority."³⁵

In spite of this, surprisingly enough, one of the cases cited frequently on indirect notice is *Watters v. Lincoln*,³⁶ decided in South Dakota, where the Code was adopted. The case is a good illustration of the tendency of the courts, particularly in the nineteenth century, to interpret statutes in a manner consistent with the traditional common law rules, or to ignore statutory law altogether. In none of the four states which enacted the Field Civil Code is there any indication that the courts would be willing to depart from the view taken in other jurisdictions and apply the Code's provision. There are no cases on the point. It has been stated that the doctrine of *Watters v. Lincoln* is "not law in California."³⁷ This conclusion was based not only on the above provision of the Code, but also on decisions to the effect that an offer which comes to

31 *Id.* at 472.

32 1 CORBIN, CONTRACTS § 40 (1950).

33 The provision is CAL. CIV. CODE § 1581, MONT. REV. CODES ANN. § 13-317 (1947), N.D. CENT. CODE ANN. § 9-03-17 (1959), S.D. CODE § 10.0316 (1939).

34 2 Ch. D. 463 (1876).

35 New York Draft Civil Code 234 (1865).

36 29 S.D. 98, 135 N.W. 712 (1912).

37 Lewinsohn, *Mutual Assent in Contract Under the Civil Code of California*, 2 CALIF. L. REV. 345, 366 (1914).

the offeree through the casual report of a stranger cannot be accepted so as to impose an obligation upon the offeror,³⁸ and that "a contract cannot be made by manifesting to strangers that assent which the law requires to be communicated mutually between the parties."³⁹ However, neither of those two cases involved a revocation of an offer, and it seems improbable that California would take on this point a view contrary to that of the other states, including South Dakota.⁴⁰

5. *Revocation of Public Offers*

On this point the *Restatement* lays down the following rule:

An offer made by advertisement in a newspaper, or by a general notification, to the public or to a number of persons whose identity is unknown to the offeror, is revoked by an advertisement or general notice given publicly equal to that given to the offer before a contract has been created by acceptance of the offer.⁴¹

The foundations for this rule were laid down by the leading case of *Shuey v. United States*.⁴² In April 1865, the federal government announced that a reward would be given for information leading to the arrest of an accomplice in Lincoln's murder. The revocation of this offer was published in November of the same year. Next April, the plaintiff, staying in Europe and not knowing about the revocation, discovered information which led to the arrest of the wanted person and claimed the reward. The approach adopted by the Supreme Court was that the offer of a reward is a promise conditional upon the rendition of the proposed service before the offer is revoked. The Court stated that like any other offer, the one under consideration "might . . . be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer."⁴³ The fact that plaintiff did not know about the withdrawal was held to be immaterial, as the offer had not been made to plaintiff directly. It seems that the rule laid down by the Court is the only one which is practical. The only other alternative would be to treat such offers as irrevocable,⁴⁴ and as becoming ineffective only upon the lapse of a reasonable time. To require direct notices of revocation of a public offer to the members of the general public would be impossible. The opinion of the Court met with some criticism, however, particularly because of a statement that the plaintiff should have known that the public offer could be revoked in the manner in which it was made. How could the Court require anyone to know a rule which previously had never been formulated?

The requirement that revocation must be effected by the *same* method by which the offer was published is satisfied by use of a *similar* method. Thus,

38 *Canney v. South Pacific Coast R.R.*, 63 Cal. 501 (1883).

39 *Leszynsky v. Meyer*, 53 Pac. 703, 704 (Cal. 1898).

40 It does not appear that there is any significant provision of the Georgia or Louisiana Civil Codes on this question.

41 *RESTATEMENT, CONTRACTS* § 43 (1932).

42 92 U.S. 73 (1875).

43 *Id.* at 76.

44 1 *WILLISTON, CONTRACTS* § 59 (3d ed. 1957).

in *Sullivan v. Phillips*,⁴⁵ the court said as dictum: "The offer of a reward can only be revoked in the manner in which it was made; or in some other manner which will give the revocation like publicity as the offer." If publicity given to the revocation will not likely reach the same public as the offer, withdrawal will not be effective. Thus in *Hoggard v. Dickerson*,⁴⁶ it was held that the withdrawal of an offer of a reward for the apprehension of a criminal was not effected by the publication of an offer of a different reward in another community, especially since the subsequent offer did not indicate an intention to revoke the earlier one.

While the offeror's intention to revoke should be announced to the public, it may appear from the very circumstances of the offer that the offeror intends to be bound only as long as the situation which prompted the making of the offer exists. Thus in *Shaub v. City of Lancaster*,⁴⁷ with reference to a resolution of the city council directing the mayor to offer a reward for the arrest of arsonists, the court said that the offer of reward "was intended as a remedy for an existing evil, and when its purpose was accomplished it became *functus officio*. It was . . . but a temporary order, to meet a temporary necessity." It follows that the offer was binding only for a reasonable time, during which its original purpose could be accomplished, but not beyond that time. The court distinguished the resolution from a city ordinance which could have a more permanent character.

This holding coincides with the statement that the validity of an offer will continue only during the period of time which will seem reasonable under all circumstances. Although it has been stated that a public offer may be revoked by lapse of time, it seems that there is here no revocation proper, but simply a lapse of the public offer, as might happen with any other offer. In *Shaub v. City of Lancaster* the lapse of time since the last proclamation of the reward was 10 years. In *Mitchell v. Abbott*,⁴⁸ it was held that 12 years was "much more than a reasonable time," and in the early case of *Loring v. Boston*,⁴⁹ the court found that the period of three years and eight months from the discontinuance of the publication of the offer rendered the offer ineffective.

In the light of the above, it appears definite that the mere discontinuance of the publication of the offer should not be considered as revocation. The case of *Carr v. Mahaska County Bankers Association*⁵⁰ expressly supports this proposition. The fact that the posters announcing a reward were thrown into the wastebasket by the defendant's cashier did not have the effect of a withdrawal of the offer. The court suggested that an effective revocation could have been made in the manner in which the offer was made, "as perhaps by posting in its bank a notice of revocation," or by any other manner which would give the alleged revocation "like publicity as the offer." It seems that it might have been possible for the court to hold that the offer became ineffective because of the lapse

45 178 Ind. 164, 98 N.E. 868, 869 (1912).

46 180 Mo. App. 70, 165 S.W. 1135 (1914).

47 156 Pa. 362, 26 Atl. 1067, 1069 (1893).

48 86 Me. 338, 29 Atl. 1118, 1119 (1894).

49 48 Mass. (7 Met.) 409 (1844).

50 222 Iowa 411, 269 N.W. 494 (1936).

of time from its last publication to the purported acceptance: three years. The court did not expressly refer to this possibility, but in discussing the intention of the defendant it pointed out that "the purpose of the offer was not the discovery of perpetrators of crimes already committed. . . . [T]he public could reasonably assume that the offer once made was intended to continue into the future. . . ." ⁵¹ Thus, impliedly, the court found that the lapse of three years was under all the circumstances not sufficient to make the offer inoperative.

A contrary approach was taken in *Lauve v. Balfour*,⁵² where such discontinuance was held to be "tantamount to an express revocation." Plaintiff had complied with the terms of the offer ten or eleven months after its publication had been discontinued. A better approach would have been that under the circumstances of the case the offer became ineffective by the lapse of this amount of time. However, the court stated that in the view it took of the case, it deemed it unnecessary to answer the following question: "Where a notice of reward is unlimited as to time, and unrestricted as to occasion, what would be a reasonable time in which to claim its benefits?" ⁵³

In another case it was held that the revocation (or rather modification) of a public offer made in a newspaper must be made by personal notices rather than by the same means used to make the offer itself. The court stated that the contestants for a prize in a subscription contest were not "either obliged or . . . expected to read possibly the whole of each and every edition of the newspaper thereafter published for the purpose of ascertaining whether or not any of the rules of the contest had been either modified or abandoned." ⁵⁴ This approach, if generally accepted, would change the law settled by other decisions. The soundness of the foregoing statement may be doubted, and in any case the holding should be limited to the circumstances of that particular case:

Necessarily . . . the several contestants would be required to be in constant touch with the management of the newspaper. . . . The relationship between the parties, considering the population of the city (a city of the sixth class) wherein the newspaper was published, and the surrounding circumstances, would be of a very close personal nature. The contestants were not so numerous but that if any changes in the rules of the contest were either contemplated, or had been made by the management, the most natural thing to have been anticipated by each of the parties to the contract would have been an actual notification thereof, rather than the impersonal method of publication in a newspaper. ⁵⁵

A contrary situation may arise when the offeror notifies a member of the general public that he revokes the offer, but does not publish the revocation to the public. Is revocation effective as to the person who was notified? Faced with the plaintiff's contention "that the attempt to revoke the offer by direct communication with him was ineffectual because the revocation must have been made by the same means as used in making the offer — newsreels and newspapers," one court answered:

51 269 N.W. at 497.

52 1 Tex. Ct. App. Dec. Civ. 396 (1879).

53 *Id.* at 397.

54 *Long v. Chronicle Pub. Co.*, 68 Cal. App. 171, 228 Pac. 873, 875-76 (1924).

55 *Id.* at 876.

This unique contention is not supported by any authority or reason. As to the remaining members of the public, the same media would have to be used in order to revoke the offer, but as to Garrison, direct personal notice that it had been withdrawn was sufficient.⁵⁶

6. *Modification of Offers*

Of course, offers may be changed at any time before they are accepted. Such a modification will work as a revocation of the original offer and substitution for it of a new one. Thus in *Thayer v. Burchard*⁵⁷ it was held that notice by a carrier to a shipper of an increase in rates to take effect in 12 days revoked the open offer that the carrier had made to carry grain at the old rates, and any grain delivered by the shipper to the carrier after the time of the notice would come under the new rates.

Naturally, to be effective, any modification of or restriction imposed on an offer must be properly communicated to the offeree. In cases of offers to the general public, it must follow the usual rules of communication with the public. An offer of a soap company which advertised to the public that it would exchange some transportation tickets for its premium coupons and wrappers could not be changed or restricted by its "Premium Catalogue," which was not in general circulation. Plaintiff, who had acquired by purchase several hundred thousand of these coupons, was held entitled to the tickets as against the contention of the defendant soap company that its "Premium Catalogue" was an integral part of its general coupon scheme. The catalogue included a provision that coupons would be redeemed only when presented by the person who purchased the product from which the coupon was taken. On the other hand a public announcement by the defendant that the coupons were not transferable was a withdrawal of its previous unrestricted offer, but this could not limit defendant's liability to plaintiff, who had already acquired the coupons before the announcement.⁵⁸

C. TIME OF REVOCATION

1. *General Common Law Rules*

As pointed out above, the revocation of an offer will not be deemed effective unless it is communicated to the offeree before a valid acceptance on his part. In case of personal dealings between the parties, this rule can hardly present any difficulties. But trouble may develop when negotiations between the offeror and the offeree are effected by mail or telegraph. As the offer may generally be revoked at any time before acceptance, the crucial question is: what is the effective time of the revocation?

The common law's answer is that revocation is not effective until it reaches

⁵⁶ *Garrison v. Warner Bros. Pictures*, 226 F.2d 354, 355 (9th Cir. 1955), *cert. denied*, 350 U.S. 968 (1956).

⁵⁷ 99 Mass. 508 (1868).

⁵⁸ *Payne v. Lautz Bros.*, 166 N.Y. Supp. 844 (Buffalo City Ct. 1916), *aff'd*, 168 N.Y. Supp. 369 (App. T. 1918), *aff'd mem.*, 185 App. Div. 904, 171 N.Y. Supp. 1094 (1918).

the offeree. Only then will it be considered as communicated to him, so as to destroy his power of acceptance. The mere putting of the revocation in the course of transmission is insufficient. In the leading case of *Byrne v. Van Tienhoven*,⁵⁹ defendants, carrying on business in Cardiff, made an offer on some tinplates to plaintiffs in New York on October 1. By a telegram sent on October 11, plaintiffs accepted, and they confirmed the telegram by a letter of October 15. Meanwhile, on October 8, because of a substantial increase in market prices, defendants had sent to plaintiffs a letter of revocation, but this letter was not received by plaintiffs until October 20. In an action for damages for nondelivery of the goods, plaintiffs were permitted to recover. The court stated, as a general rule, that in order to be effective a revocation must be communicated. Until it reaches the offeree it is ineffective, unless it appears, from the circumstances of the case, that the offeree authorized the offeror to withdraw by merely posting a letter.

This rule meets with general approval.⁶⁰ The Supreme Court of the United States, citing previous cases, stated that "the authorities are abundant to the proposition that when an offer is made and accepted by the posting of a letter of acceptance, before notice of withdrawal is received, the contract is not impaired by the fact that a revocation had been mailed before the letter of acceptance."⁶¹ Of course, there is even more reason for holding in favor of the offeree if the letter of acceptance was mailed at 10:30 A.M., and the letter revoking the offer was sent at 1:30 P.M. on the same day, as in *Geary v. Great Atlantic & Pacific Tea Co.*,⁶² or where the telegram of acceptance was sent at 12:28 P.M., and the revocation was wired at 1 P.M.⁶³

There is no reason to make a distinction between letters and telegrams. It is irrelevant that the notice of revocation might be sent before the notice of acceptance. If the offeree sends notice of acceptance before he receives notice of revocation, the contract is entered into and the purported withdrawal is ineffective. In *Stephen M. Weld & Co. v. Victory Mfg. Co.*,⁶⁴ the offeree received a message cancelling the order just twenty-five minutes after it wired its acceptance. The court held that "when the plaintiffs on September 20 filed with the Telegraph Company at 10:15 A.M. the telegram accepting the offer, the contract was complete."⁶⁵ To the same effect is *L. & E. Wertheimer, Inc. v. Wehle-Hartford Co.*,⁶⁶ where the court held that revocation becomes "effective only when received by the plaintiff." Similarly, in the well-known case of *Paramount Pictures Distrib. Corp. v. Gehring*,⁶⁷ the court said: "[T]he revocation of an option contract only operates from the time it is received by the one to whom it is sent and has no legal effect prior to that time"; and in *Peacock*

59 [1880] 5 C.P.D. 344.

60 1 CORBIN, CONTRACTS § 39 (1950); 1 WILLISTON, CONTRACTS § 56 (3d ed. 1957); RESTATEMENT, CONTRACTS § 41 (1932).

61 Patrick v. Bowman, 149 U.S. 411, 424 (1893).

62 366 Ill. 625, 10 N.E.2d 350 (1937).

63 Brauer v. Shaw, 168 Mass. 198, 46 N.E. 617 (1897).

64 205 Fed. 770 (D.C. N.C. 1913).

65 *Id.* at 775.

66 126 Conn. 30, 9 A.2d 279, 282 (1939).

67 283 Ill. App. 581, 590 (1936), quoting from *Wagner v. McClay*, 306 Ill. 560, 138 N.E.164 (1923).

v. Harrison,⁶⁸ the court stated that a revocation "sent by mail is not effective until actually received by the offeree."

If an offer after it becomes operative can be revoked at any time before it is accepted, a fortiori it can be revoked before it takes effect, that is, before it reaches the offeree. Actually there is no revocation of the offer in the latter situation, as it never became operative. At any rate, in both situations the offeror can annul his previous declaration of intention. The same is true if offer and revocation reach the offeree simultaneously. In *Sherwin v. National Cash-Register Co.*,⁶⁹ the offeror was held not to have entered into the contract where he sent the offer by letter deposited after the mail pick-up on one day, and attempted to withdraw from the transaction by letter deposited the next day in time for the outgoing mail. It seems that both letters "went out together, and were received at the same time." Even if it were not true, the offeror was entitled to the decision on the alternative ground that, "at all events, the letter was posted in time to have reached the plaintiff one or two days before the date of its letter of acceptance."⁷⁰

To the same effect is illustration 1 to section 41 of the *Restatement*, which states that if the revocation is ineffectual because it was received by the offeree after he mailed his acceptance, the offeror "is not precluded from asserting the existence of a contract" even if the offeree, by a mistake of law, "assumes that there is no contract and changes his position in reliance on that assumption."⁷¹

It could be argued that there is no overwhelming reason for not applying the same rules to every manifestation of intention in the law of contracts, i.e., to offer, revocation or acceptance. And indeed in some jurisdictions they are treated the same. However, it has been pointed out that there are good reasons for differentiation: the offeror starts the chain of events which may lead to the conclusion of a contract; ordinarily, the offeree has no reason to surmise that the other party will wish to withdraw from his proposal. Expressly or impliedly, the offeror authorizes the offeree to use the same means of communication as the offeror did; and upon placing his acceptance in the course of transmission, the offeree can reasonably believe that the contract has been validly entered into and take "immediate steps toward performance or other action in reliance."⁷² Mr. Justice Holmes commented that "it would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract."⁷³

The question may arise whether an offer is effectively revoked upon the receipt by the offeree of a communication to this effect even before he reads it. There seems to be no judicial authority on this point. The suggestion that the revocation "should be held effective as soon as the offeree has had a reasonable opportunity to open and read the letter after it has been put into his hands or has been delivered at his business or home address"⁷⁴ appears sound. A reasonable

68 189 S.W.2d 500, 503 (Tex. Civ. App. 1945).

69 5 Colo. App. 162, 38 Pac. 392 (1894).

70 38 Pac. at 393.

71 RESTATEMENT, CONTRACTS § 41, Illustration 1 (1932).

72 1 CORBIN, CONTRACTS § 39 (1950).

73 Brauer v. Shaw, 168 Mass. 198, 46 N.E. 617, 618 (1897).

74 1 CORBIN, CONTRACTS § 39 (1950).

standard of conduct should be required, and no one should be permitted to take advantage of ignorance caused by a neglect to read his own mail.

2. *The Minority Approach*

In spite of the strong reasons supporting the majority rule that revocation is effective only when it is received by the offeree, there is some authority to the contrary. It seems that the most important argument for the minority position is the alleged advantage of uniformity in rules applicable to each expression of contractual intention: offer, acceptance and revocation.

At common law, decisions to this effect are isolated. In the early case of *M'Culloch v. The Eagle Insurance Company*,⁷⁵ defendant's offer to insure plaintiff's ship, sent by letter on January 1, was accepted by plaintiff by a letter mailed on January 3, before he received the revocation of the offer mailed on January 2. The ship was afterwards lost on the voyage, and the plaintiff brought a suit against the defendant, claiming that a valid insurance contract had been entered into. The court said that "the most reasonable" opinion was that there was no contract, and continued:

The offer did not bind the plaintiff until it was accepted, and it could not be accepted, to the knowledge of the defendants, until the letter announcing the acceptance was received, or at most, until the regular time for its arrival by mail had elapsed.⁷⁶

In 1917, an Illinois appellate court accepted the same theory, holding that acceptance is not effective until receipt, and that revocation is effective when placed in the course of transmission. Only an abstract of the decision was published; the pertinent passages read as follows:

1. . . . An offer of sale or purchase of merchandise may be withdrawn at any time before the acceptance of the offer has been received by the offerer.

2. . . . Where defendant sent to plaintiffs a telegraphic offer for certain goods reading "Offer seven ten your track immediate shipment to New York. Answer," which plaintiffs accepted by telegraph, but before receipt of plaintiff's telegram defendant telegraphed its withdrawal of its offer, *held* that the delivery of the withdrawal telegram to the telegraph company was a delivery to the plaintiffs and was in sufficient time to prevent the completion of the contract.⁷⁷

Although there have been no recent decisions to the same effect which were based on case law, the idea was accepted by David Dudley Field and incorporated into his civil code, which was adopted in four states. The California Civil Code provides that "A proposal is revoked: 1) By the communication of notice of revocation by the proposer to the other party, in the manner prescribed by Sections 1581 and 1583, before his acceptance has been communicated to the former";⁷⁸ and section 1583 reads as follows: "Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer. . . ."⁷⁹

⁷⁵ 18 Mass. (1 Pick.) 278 (1822).

⁷⁶ *Id.* at 281.

⁷⁷ *Stahl v. Loeb, Cooney & Loeb*, 209 Ill. App. 245, 246 (1917).

⁷⁸ CAL. CIV. CODE § 1587.

⁷⁹ CAL. CIV. CODE § 1583.

Thus, although section 1583 refers to communication to the offeror of acceptance, its provision that acceptance is deemed to be communicated upon placing it in the course of transmission seemingly is made to refer to revocation, *i.e.*, revocation takes place upon placing it in the course of transmission before an acceptance has been placed in transmission. Sections 13-323 and 13-319 of the Civil Code of Montana are identical with the above sections of the Civil Code of California; so are sections 9-03-23 and 9-03-19 of the Civil Code of North Dakota and, with trivial changes, sections 10.0322 and 10.0318 of the Civil Code of South Dakota. In applying the above provisions of the codes, the courts "are aware that a different rule exists in many other jurisdictions," but must abide by the statutory law which "establishes the rule."⁸⁰

3. Conclusion

The above analysis shows that there is a distinct split among American jurisdictions on the time at which revocation should be considered effective. Two additional questions could be asked: Is it relevant that (a) the offeror, at the time of his purported revocation, knew of the offeree's acceptance, or (b) the offeree, at the time of mailing his acceptance knew of the offeror's revocation, though it had not yet reached him? There is a dearth of authority on these questions.

(a) It seems that the offeror's knowledge of the offeree's acceptance generally is irrelevant in jurisdictions which accept either the majority or minority view. Where the offer is made by mail or other such means of communication, and the offeror does not clearly state otherwise in his offer, the contract is formed at the moment the offeree places his notice of acceptance in the course of transmission. At this moment, the offeror's power of revocation is terminated, whether he knows about the acceptance or not. Seemingly, the California Civil Code, referred to above, requires for effective revocation only that the offeror place his revocation in the course of transmission before the offeree's acceptance is so placed. But even this rule requires offeror to *act*, that is, place in transmission, *before* offeree does, so that once acceptance takes place offeror cannot thereafter revoke, whether he knows of it or not. Only under the discredited view that acceptance does not become effective until notice of it is received by the offeror, and not when placed in course of transmission, would the offeror's power of revocation be affected by his knowing that the offeree had already accepted, before he received notice of this from the offeree himself.

A fortiori, where the offer does not call for notice of acceptance, the contract is formed when acceptance takes place, and the offeror cannot thereafter revoke whether he knows of the acceptance or not. And where the offeror learns of only a mere intention to accept, that is irrelevant because such intention does not have any legal effect until it ripens into the act of acceptance, and it does not destroy the offeror's power of revocation.

⁸⁰ *Watters v. Lincoln*, 29 S.D. 98, 135 N.W. 712, 715 (1912); compare the court's disregard in the same case of a different provision of the South Dakota Civil Code, note 36 *supra* and accompanying text.

(b) An implied answer to this question was given by a court in the following words:

The prevailing rule is, as to sales or contracts to sell by letter, that, if a definite proposition is made and accepted by letter, the acceptance being within a reasonable time, and before knowledge of any retraction, the contract is closed by mailing the acceptance duly addressed.⁸¹

The court emphasized the fact that acceptance was made "before knowledge of any retraction," and therefore it was effective. *A contrario*, if the offeree knew about the revocation, his acceptance would not be valid. This situation is covered by the theory of indirect notice, which destroys the offeree's power of acceptance.

D. TERMINATION OF OFFER BY OFFEROR'S OR OFFEREE'S DEATH, INSANITY, OR BANKRUPTCY

1. *In General*

If the subjective approach is valid and an actual "meeting of the minds" is necessary to create a contract, the death of either party before the offer is accepted should certainly have the effect of terminating the offer, and insanity should have the same effect, there being no possibility of framing a legally valid intention to enter into the agreement. However, the subjective approach has been rejected, and the idea of a "meeting of the minds" replaced by that of the offeror's granting to the offeree a power of acceptance. If so, death or insanity of the offeror should not have the effect of automatically terminating the offer, at least when the event is unknown to the offeree. In spite of this, the American common law rule, as expressed in section 48 of the *Restatement*, is as follows: "A revocable offer is terminated by the offeror's death. . . ."⁸² The general rule is that for the formation of a valid contract both parties must be living at the time of acceptance. This has been frequently expressed by the courts. This is a typical statement, taken from *Hutsell v. Citizens' Nat'l Bank*: "The death of either party before acceptance is communicated causes an offer to lapse. 13 Corpus Juris, p. 298. . . ."⁸³

2. *The Death of the Offeror*

According to the prevailing view, the above-mentioned rule applies by the very fact of the death of the offeror, notice of death not being requisite. This rule has been adopted by the *Restatement*.⁸⁴ In the familiar case of *Dickinson v. Dodds*, the court stated tersely (as a dictum): "It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead."⁸⁵ The rule has been announced also "with reference to a revocable offer con-

81 *Shaw Wholesale Co. v. Hackbarth*, 102 Ore. 80, 198 Pac. 908, 911-2 (1921), *rev'd on other grounds on rehearing*, 102 Ore. 93, 201 Pac. 1066 (1921).

82 It may be mentioned, at this point, that the death of the offeror or offeree will discharge the contractual duties even after the offer has been accepted, if death will make the performance impossible, *e.g.*, where the contract called for personal services (contracts *intuitus personae*). 1 CORBIN, CONTRACTS § 54 (1950). This rule relates to termination rather than formation of contracts; it should be considered in conjunction with § 49 of the *Restatement*.

83 166 Tenn. 598, 64 S.W.2d 188, 190 (1933).

84 To the same effect, see 1 WILLISTON, CONTRACTS § 62 (3d ed. 1957).

85 2 Ch. D. 463, 475 (1876).

templating a series of contracts, such as a continuing guaranty."⁸⁶ To rationalize this rule it has been suggested that an implied condition should be understood as a part of every offer "that the offer's life shall be contingent upon the continued lives of both parties. The offeror does not intend to contract with a dead man — that is certain — nor does the offeree intend to do that."⁸⁷

However, in some cases, particularly older ones, it was said that notice of death was necessary to terminate the offer. According to Williston this result could not be reached in absence of a statute.⁸⁸ Yet, it takes into account the offeree's "reasonable expectation," which idea replaced the strict application of the idea of a meeting of the minds.⁸⁹ Section 34 of the *Restatement* states that "an offer until terminated gives to the offeree a continuing power to create a contract by acceptance of the offer." Thus it could be argued that "the acceptance by an offeree of an offer, which is apparently still open, should result in an enforceable contract notwithstanding the prior death of the offeror unknown to the offeree."⁹⁰

The argument that the surviving offeree cannot be forced to enter into a contract with a personal representative, a person different from the offeror, is clearly inapplicable if it is the offeree who is insisting on the validity of the contract.⁹¹ And it has been suggested that if contract and tort liabilities pass to personal representatives, there is no reason to treat differently liability connected with an offer.⁹² At any rate, there is general agreement that an offeree cannot accept an offer *after* he receives knowledge that the offeror died.⁹³

An interesting question was discussed by the court in *Ritchie v. Rawlings*.⁹⁴ The court seemed to suggest that even if the offeree had signed the contract before the death of the offeror, this acceptance was ineffective as long as no notice about it was communicated to the other party before his death. It seems that after some hesitation the offeree decided to accept the offer, but instead of mailing his letter of acceptance, he decided to take it himself to the offeror. Upon his arrival, the offeror was dead. The facts were not clearly established, but the court held that the offer lapsed, commenting as follows:

If Ritchie upon the receipt of the letter had . . . decided in his own mind to accede to its terms, and started at once for Kansas with this in view, but on learning of the death of . . . Rawlings had concluded that he would prefer [to reject the offer], it is obvious that he would have been perfectly free to act in harmony with his new state of mind. . . .⁹⁵

If the offeree only "decided in his own mind" to accept, the statement by the

86 *Chain v. Wilhelm*, 84 F.2d 138, 141 (4th Cir. 1936).

87 *Parks, Indirect Revocation and Termination by Death of Offers*, 19 MICH. L. REV. 152, 160 (1920).

88 1 WILLISTON, CONTRACTS § 62 (3d ed. 1957).

89 *Oliphant, The Duration and Termination of an Offer*, 18 MICH. L. REV. 201, 211 n.24 (1920).

90 *New Headley Tobacco Warehouse Co. v. Gentry's Ex'r*, 307 Ky. 857, 212 S.W.2d 325, 327 (1948), citing many authors.

91 1 CORBIN, CONTRACTS § 54 (1950).

92 *Note, Termination of Offers Contemplating Unilateral Contracts by Death, Insanity, or Bankruptcy of the Offeror*, 24 COLUM. L. REV. 294 (1924).

93 1 CORBIN, CONTRACTS § 54 (1950).

94 106 Kan. 118, 186 Pac. 1033 (1920).

95 *Id.* at 1034-5.

court cannot be criticized. But if he actually signed the letter of acceptance and "put it in the course of transmission" by taking it personally to the offeror, a more difficult problem is presented. The view expressed by the court can be substantiated by the argument that as long as the letter of acceptance was in the offeree's possession, he had control over it, and his acceptance was not final.

The usual approach has been adopted by the states which have their civil law codified. Section 1587 of the California Civil Code reads as follows: "A proposal is revoked: . . . 4. By the death or insanity of the proposer." In conformity with the above provision, it was held that a subscription to a charity which was a mere offer to make a gift was revoked by the death of the offeror when it was not accepted or acted on in any way before this event.⁹⁶ And an offer of a brother to maintain his sister during the rest of her life was deemed revoked where the brother died before his offer was accepted.⁹⁷ The court was not influenced by the fact that the case involved an offer of a unilateral contract and the offeree, without knowledge of the offeror's death, had started on a trip from New York to California, where she expected to live with her brother. Of course, where there is an option given for a consideration, there is a contract, binding on the successors of the offeror after his death.⁹⁸ The Civil Code of Montana, section 13-323, is identical with section 1587 of the Civil Code of California, as is section 9-03-23 of the Civil Code of North Dakota. Section 10.0322 of the Civil Code of South Dakota contains the added words: "before acceptance of the proposal." A similar provision is found in art. 1810 of the Civil Code of Louisiana.

When the offeror died after the offeree mailed his final acceptance the contract is validly entered into, even if the letter of acceptance did not reach the offeror in his lifetime.⁹⁹ But even if the parties had agreed to enter into a contract, yet a single act remained to be done, the intervening death will defeat the formation of a contract. This act cannot be performed by the surviving party so as to relate back to the time when both parties were living.¹⁰⁰

However, irrevocable offers do not terminate by the death of the offeror. Thus "an option does not lapse at the death of the optionor, if it is supported by a valuable consideration, though it has not then been accepted. . . . 'If the contract was one the intestate could not have revoked in his lifetime, then his heirs or legal representatives have no greater right.'"¹⁰¹ Such an option is a valid contract in itself.

Similarly, the death of a subscriber to a benevolent or charitable purpose works as a revocation of the subscription, but only if the decedent himself might have revoked the promise at the time of his death. Where the promisee performed acts, expended money, or incurred enforceable liabilities on the faith of the promise, the offer could not have been revoked by the promisor, and it will not

⁹⁶ *First Trust & Savings Bank of Pasadena v. Coe College*, 8 Cal. App. 2d 195, 47 P.2d 481 (1935).

⁹⁷ *Shaw v. King*, 63 Cal. App. 18, 218 Pac. 50 (1923).

⁹⁸ *Bard v. Kent*, 19 Cal. 2d 449, 122 P.2d 8 (1942).

⁹⁹ *Haarstick v. Fox*, 9 Utah 110, 33 Pac. 251 (1893).

¹⁰⁰ *Mactier's Adm'rs v. Frith*, 21 Am. Dec. 262 (N.Y. 1830).

¹⁰¹ *Cowin v. Salmon*, 244 Ala. 285, 13 So. 2d 190, 197 (1943), and authorities there cited.

lapse by his death.¹⁰² Corbin states that "if the offer is so made that it can be accepted by the performance of a series of acts, the beginning of those acts before death of the offeror prevents the death from terminating the power of the offeree,"¹⁰³ as the offer becomes irrevocable. He adds that it has been held that the doing of the requested acts even "after the death of the offeror, but in ignorance thereof, consummates a contract,"¹⁰⁴ although there is authority to the contrary. A continuing guaranty is treated in the same manner. If "consideration for the surety's promise is given once for all at the outset" the death of the surety will not "relieve his estate, from the liabilities the guaranty imposes upon him, however long into the future they may extend."¹⁰⁵

3. *The Death of the Offeree*

The comment to section 48 of the *Restatement* embodies the common law rule, expressed in *Hutsell v. Citizens' Nat'l Bank*¹⁰⁶ and many other cases, covering the death of either of the negotiating parties: "The death or insanity of the offeree also in effect terminates a revocable offer because it thereby becomes impossible to accept it." Thus the power of acceptance does not pass to the representative of the deceased.¹⁰⁷ An offer can be accepted only by the person to whom it is made; therefore, the death of the offeree precludes the possibility of making a contract.¹⁰⁸ The rule applies also in states where codes have been enacted. Of course, the rule covers options given without consideration, so if the optionee dies before exercising his right to accept, the option lapses and cannot be exercised by the administrator of the estate.¹⁰⁹ Again, if the offer was irrevocable, and the performance of the contract did not become impossible because of the death, the representatives of the offeree then retain the power of acceptance.¹¹⁰ Sometimes the parties may be specific on that point. Thus, in *Ankeny v. Richardson*, they agreed that "the covenants . . . shall extend to and be binding upon the heirs, executors, and administrators of the parties to this lease."¹¹¹ But the lack of such a provision would not change the result.

4. *Insanity*

Section 48 of the *Restatement* states that "a revocable offer is terminated by . . . such insanity as deprives him [the offeror] of legal capacity to enter into the proposed contract," and comment to this section makes it clear that the same rule is applicable to the insanity of the offeree. Cases on this point are few. Of course, it must be understood that the problem involves insanity supervening after the offer has been made. Insanity existing at the time when

102 *Eastern States Agricultural & Industrial League v. Vail's Estate*, 97 Vt. 495, 124 Atl. 568 (1924).

103 1 CORBIN, CONTRACTS § 54 (1950).

104 *Ibid.*

105 4 WILLISTON & THOMPSON, CONTRACTS § 1253 (Rev. Ed. 1936).

106 166 Tenn. 598, 64 S.W.2d 188 (1933).

107 *Achenbach v. Kurtz*, 306 Pa. 384, 159 Atl. 718 (1932); RESTATEMENT, CONTRACTS § 54, Illustration 1 (1932).

108 1 WILLISTON, CONTRACTS § 62 (3d ed. 1957).

109 *Compare Bard v. Kent*, 19 Cal. 2d 449, 122 P.2d 8 (1942).

110 1 CORBIN, CONTRACTS § 54 (1950).

111 187 Fed. 550, 553 (8th Cir. 1911).

the offer is being made raises the problem of the legal capacity to make such offer rather than that of its termination. If for the validity of a contract both parties must have legal capacity to contract, insanity of the offeree should have the same effect as that of the offeror. If the offeree becomes insane between the time of the offer and the time of the purported acceptance, there arise, in theory, two questions: (a) was the offer terminated? and (b) did the offeree have the necessary capacity to accept?

The clearest statement of the rule as to offeror's supervening insanity was made in *Beach v. First Methodist Episcopal Church*,¹¹² where the court, asserting that a promise to pay a sum of money for the erection of a church stands as a mere offer and may be revoked at any time before it is acted upon, held that the supervening insanity of the promisor, "by operation of law, was a revocation of the offer,"¹¹³ and that "the insanity of Dr. Beach rendered him, in law, as incapable of making a contract, or of continuing or repeating an offer to the church, as if he had been actually dead."¹¹⁴ The question may be asked whether the offeror's supervening insanity revokes the offer even if it remains unknown to the offeree. It has been stated by one writer that "the effect of insanity on an offer is not to terminate it immediately, but only when the offeree has notice,"¹¹⁵ but this statement is not based on any judicial decision.

Corbin is in doubt as to whether the rule that insanity makes the offer ineffective is sound, stating that "insanity is far less easily determinable as a fact than is death."¹¹⁶ For Williston, there is "no doubt that known insanity on the part of either offeror or offeree" terminates the offer. But in cases where insanity is unknown, the answer to the question should "depend on whether the legal incapacity of an insane person to contract is complete."¹¹⁷ It does not seem that the statement "known insanity" relates to the notice of the other party about it. There is little law on the point. The courts would probably apply the same rules that govern situations in which the offeror has died but the offeree has not had notice of his death.¹¹⁸ As to the degree of supervening insanity necessary in order to revoke an offer, the modern tendency seems to be to insist that insanity revokes the offer only when it reaches such degree that the contract would be absolutely void, or at least voidable, if such insanity had existed at the time of the offer.¹¹⁹

As in situations involving death, it has been said that supervening insanity of the offeree does not revoke an offer which was irrevocable, so that an option holder's guardian had the power to accept the offer. This is Williston's understanding of the case of *Dibbins v. Dibbins*,¹²⁰ where the lunatic died before he

112 96 Ill. 177 (1880).

113 *Id.* at 179.

114 *Id.* at 180.

115 Note, *Termination of Offers*, *supra* note 92, at 297.

116 1 CORBIN, CONTRACTS § 54 (1950).

117 1 WILLISTON, CONTRACTS § 62A (3d ed. 1957).

118 *Ibid.*

119 *Ibid.*; RESTATEMENT, CONTRACTS § 48 (1932). Concerning the rules which govern the invalidity or voidability of lunatics' and intoxicated persons' contracts, see 2 WILLISTON, CONTRACTS §§ 249-63 (3d ed. 1957).

120 [1896] 2 Ch. 348; 1 WILLISTON, CONTRACTS § 62A n.2 (3d ed. 1957).

exercised the option, but since his representative did not exercise it in time no contract was concluded.

5. *Bankruptcy*

It was stated in 1924 that "a novel question is presented by the situation where the offeror, unknown to the offeree, becomes bankrupt before the act of acceptance is complete."¹²¹ The question continues to be "novel," and due to lack of authority the answer to the question whether an offer is terminated by the bankruptcy of one of the parties can only be speculation. Nor do the foremost treatises on contracts deal with this point.

In a few writings it is stated that an offer was held to lapse where one of the parties became a bankrupt and his property was transferred to trustees. This statement is based on the authority of *Meynell v. Surtees*.¹²² In fact, in the argument of one of the parties the following statement appears: "No acceptance is attempted to be proved until after the date of Ord's bankruptcy; but that event determined the proposal, and the assignees were not bound by it."¹²³ In the opinion itself, however, there is nothing on this point. Although the property involved in the case was purchased from a bankrupt, the decision rested on rules applicable to specific performance of contracts and the necessity of unequivocal acceptance of an offer.

In *Goodspeed v. Wiard Plow Co.*,¹²⁴ as one of the grounds for the decision, the court stated: "The shipment of the goods was not made in accordance with the terms of the order, and was not made until the order had been rescinded by notice of the dissolution" of the partnership. Although the case is not exactly in point, it may indicate that an offer of a business enterprise terminates when the enterprise ceases to be a going concern and the offeree receives notice of this fact. In *Dunlop v. Baker*,¹²⁵ the holder of an option under seal was permitted to exercise the option and get specific performance after the optionor had been adjudicated a bankrupt and after the land had been sold to enforce the creditors' lien. The court treated the optionee as having an equitable claim on the land. He was permitted to redeem the land after satisfying the claims of creditors.

It has been suggested that bankruptcy should not automatically revoke an offer.¹²⁶ The offer still could be accepted, but the contract would bind the bankrupt personally and affect his after-acquired property. If the bankruptcy should constitute a disablement from performance, the offeree should be permitted to rescind and recover the consideration. These are purely speculative theories, not supported by any authority. The dearth of cases on the point may indicate that the problem is not of great practical importance.

121 Note, *Termination of Offers*, *supra* note 92, at 297.

122 3 Sm. & G. 101, 65 Eng. Rep. 581 (Ch. 1855).

123 65 Eng. Rep. at 585.

124 45 Mich. 322, 7 N.W. 902 (1881).

125 239 Fed. 193 (4th Cir. 1916).

126 Note, *Termination of Offers*, *supra* note 92, at 297.